IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C.(A) Nos.196 and 197 of 2007

Commissioner of Income Tax
Chennai. .. Appellant

Vs

M/s.MSK Constructions Pvt. Ltd.,
220 (Old No.868)
Poonamalle High Road
Kilpauk, Chennai - 600 010. .. Respondent

Appeals under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench dated 28.2.2006 made in ITA Nos.822 and 823/Mds/2004 for the assessment years 1997-98 and 2000-2001 respectively against the Order of the Commissioner of Income Tax [Appeals] in ITA.No.216 AND 218/2003-04 respectively dated 9.1.2004 against the Order of the Asst. Commissioner of Income Tax, Company Circle IV [3], Chennai 34, dated 26.2.2003 in PA.No/GI No.Ms.13, AAA CM 2608 B for the assessment Year 1997-98 and 2000-01 respectively.

For Appellant : Mrs.Pushya Sitaraman
Sr. Standing Counsel (IT)

J U D G M E N T
(Delivered by P.D.DINAKARAN, J.)

The above tax case appeals are directed against the order of the Tribunal even dated 28.2.2006 made in ITA Nos.822 and 823/Mds/2004 for the assessment years 1997-98 and 2000-2001 respectively, raising the following common substantial questions of law:

"i. Whether in the facts and circumstances of the case, the Tribunal was right in deleting the penalty imposed under Section 271(1)(c) on the ground that the assessee suffered a loss in the relevant assessment year? and

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ii. Whether in the facts and circumstances of the case, the amendment to explanation 4(a) to Section 271 (1)(c) is to be treated as having retrospective effect?"

2. The Revenue is the appellant. The assessee filed a loss return and claimed deduction of interest paid to IREDA under the head Wind Mill Division. The assessment was completed under Section 143(3) of the Income Tax Act (for brevity, "the Act"). The assessment was reopened by issue of notice under Section 148 on the ground that the interest on borrowings from IREDA were not paid during the year. The Assessing Officer disallowed the unpaid interest resulting in reduction of loss and also levied penalty invoking Section 271(1)(c) of the Act. On appeals at the instance of the assessee, the Commissioner of Income Tax (Appeals) deleted the penalty and allowed the appeals in favour of the assessee. On appeals, at the instance of the Revenue, the Tribunal held that the disallowance of interest under Section 43B of the Act does not amount to concealment of income and observed that when there is no tax payable then penalty could not be levied. Hence, the Revenue has preferred these appeals raising the questions of law referred to above.

3. Mrs.Pushya Sitaraman, learned Senior Standing Counsel for the Revenue, fairly concedes that the issues raised in these appeals have been squarely covered in favour of the assessee and against the Revenue by the decision of this Court in Commissioner of Income Tax v. A.Hariraman, [2006] 282 ITR 607.

4. In Commissioner of Income Tax v. A.Hariraman, [2006] 282 ITR 607, this Court held as under:

"The word "income" occurring in clauses (c) and (iii) of section 271(1) of the Income-tax Act, 1961, refers to positive income only and not a loss. Penalty could be imposed only in addition to the tax payable. A plain reading of clauses (ii) and (iii) in section 271(1)(c) of the Act, particularly in the context of the words "in addition to tax, if any payable by him" employed in sub-clauses (ii) and (iii) would make it clear that the penalty contemplated in all the above clauses is a measure of tax payable by the assessee. In other words, **if no tax is payable by the assessee, there would be no penalty which could be levied on the assessee. The penal provisions of section 271(1)(c) are attracted only in the case of an assessee having positive income and not loss as the question of concealment of income to avoid payment of tax would arise only in the former case. No penalty can be levied when the result of the computation made by the Assessing Officer is a loss.**"

(emphasis supplied)

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5. In the instant case, the Tribunal after going through the records observed that the disallowance of interest under Section 43B of the Act does not amount to concealment of income and that when there is no tax payable, penalty could not be levied. We, therefore, find no illegality or infirmity in the order of the Tribunal in deleting the penalty. Hence, finding no substantial question of law arising for our consideration, these appeals are dismissed. No costs. Consequently, M.P.No.1 of 2007 is closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Madras Bench "A", Chennai.

2.The Secretary, Central Board
of Direct Taxes, New Delhi.

3.The Commissioner of Income Tax
Chennai-III, Chennai.

4.The Assistant Commissioner
of Income-tax-III,
Company Circle IV,
Chennai.

+ 1 CC To Ms.Pushya Sitaram,Sr. Standing Cousel, SR NO.13793

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